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Supreme Court, U.S.
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No. 941478

In the
Supreme Court of the United States
October Term, 1994

In re Greco

On Petition for Writ of Mandamus
To The Probate & Family Court of
The Commonwealth of Massachusetts

PETITION FOR WRIT OF MANDAMUS

Frank A. Greco, MD, PhD
Pro Se
250 Grove St.
Lexington, MA 02173
(617) 860-9897

57pp

QUESTIONS PRESENTED

-where the judge is the trier of fact in a civil case in which neither party is indigent, does the appointment of counsel by the court for one party but not the other violate equal protection and due process as secured by Article 14 of the Amendments to the U.S. Constitution?

-where the judge has no authority to appoint counsel, does the appointment of counsel for a party in a civil case constitute a usurption of authority?

-where the judge is the trier of fact and has been apprised of the constitutional issues above, does the failure to take any steps to remedy the situation demonstrate a disabling prejudice on the part of the judge?

PARTIES

All persons listed are citizens of the United States.

Frank A. Greco, MD, PhD — Petitioner
250 Grove St.
Lexington, MA 02173
(617) 860-9897

Dr. Greco is a physician and a Commander in the US Naval Reserve.

Hon. Edward J. Ginsberg — Respondent
Associate Justice
Probate & Family Court
305 Walden St.
Concord, MA 01742
(617) 729-5479

Judge Ginsberg is the judge to whom the Greco case is currently assigned.

Hon. Mary C. Fitzpatrick — Respondent
Chief Justice
Probate and Family Court
Three Center Plaza
Boston, MA 02108
(617) 742-9743

Judge Fitzpatrick is also First Justice for the Suffolk Division of the Probate Court.

Hon. Christina Harms — Respondent
Associate Justice
Probate & Family Court
649 High St.
Dedham, MA 02026
(617) 326-7200

Judge Harms appointed Mr. Zupcofska as counsel for Ms. Greco.

Hon. Francis P. O'Connor — Respondent
Associate Justice
Supreme Judicial Court for
Massachusetts
1412 Courthouse
Boston, MA 02108
(617) 557-1193

Justice O'Connor denied Dr. Greco's motion to stay proceedings in the probate court.

Rita M. Greco, MS — Respondent
12 Short St.
Charlestown, MA 02129
(617) 242-1778

Dr. Greco and Ms. Greco were once husband and wife.

Peter Zupcofska, Esq. — Attorney for
Bingham, Dana & Gould — Rita M. Greco
150 Federal St.
Boston, MA 02110-1726
(617) 951-8000

Hon. Scott Harshbarger — Attorney General
One Ashburton Place — for Massachusetts
Boston, MA 02108-1698
(617) 727-2200

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JURISDICTION

Dr. Greco moved the probate court to stay proceedings on January 25, 1995.(Appendix, p. 10) After Judge Ginsberg denied that motion, Dr. Greco petitioned the Supreme Judicial Court of Massachusetts to stay proceedings. That motion was denied on February 16, 1995.(Appendix, p. 16) Jurisdiction is conferred by Article III, sec. 2 of the US Constitution and by 28 USC sec. 1651(a).

CONSTITUTIONAL PROVISIONS

Article 14 of the Amendments to the US Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Rita Greco filed to divorce Dr. Greco in September 1989 in the Suffolk Division of the Probate & Family Court Department of the Commonwealth of Massachusetts (Docket No. 89D1677). There is one child of the

marriage, a daughter, now eight years old. After a trial in January 1991, the probate court (Harms, J) issued a judgment of divorce nisi. Dr. Greco did not believe that the shared custody plan in the judgment nisi was in the best interests of the child and filed a Notice of Appeal. In May 1991 the Grecos were able to reach an agreement concerning custody. They filed a stipulation with the court and tried the arrangement for three months. In September 1991 the Grecos drafted an expanded version of the stipulation to settle all aspects of the divorce; the major difference between the judgment nisi and their agreement was the shared custody plan for the child. They jointly moved to amend the judgment nisi to the terms of their agreement.(Appendix, p. 1) Frank and Rita Greco, both pro se, appeared before Judge Harms, the trial judge, in November 1991. Judge Harms denied the joint motion, stating that Rita Greco had signed the agreement under duress because of Dr. Greco's appeal.(Appendix, p. 3) She appointed Mr.

Peter Zupcofska as counsel for Ms. Greco. She did, however, issue a temporary order that the Grecos may continue to live according to their agreement, as they had for the preceding seven months.

In January 1992 Frank and Rita Greco filed another joint motion to amend the judgment nisi to the terms of their agreement.

In February 1992 Mr. Zupcofska entered his appearance. He filed motions to vacate the temporary order of Judge Harms, to dismiss Dr. Greco's appeal, to rescind the agreement, and to "re-enter" the judgment of divorce, all of which were allowed (Smoot, J). At that point Dr. Greco first moved the probate court to appoint him counsel as well, which motion was denied (Smoot, J). There was no evidence presented at the hearing which resulted in an abrupt change of the custody arrangement for the child and Dr. Greco has appealed from that order. The record has never been assembled for appeal.

In 1994 Dr. Greco moved to Lexington,

MA. Because Frank and Rita Greco could not agree where the child should attend school, Dr. Greco filed a Complaint for Modification in July 1994. The sole issue in the original complaint was where the child should attend school. Dr. Greco later amended the complaint to include the issue of the child's continued need for psychotherapy. Mr. Zupcofska entered his appearance for Ms. Greco, who counterclaimed asking for sole legal custody of the child.

In August 1994 Dr. Greco moved again that either the probate court appoint him counsel or remove Mr. Zupcofska as counsel for Rita Greco.(Appendix, p. 5) The probate court (Ginsberg, J) denied that request. Dr. Greco filed an interlocutory appeal to the Appeals Court (Docket No. 94J594), which was also denied (Laurence, J). Dr. Greco then filed a complaint in the Supreme Judicial Court for Massachusetts under M.G.L. ch. 211, sec. 3 raising the questions presented above (Docket No. SJ 94-435). The relief requested was denied by a single justice (O'Connor, J).

That denial was appealed to the full bench of the Supreme Judicial Court for Massachusetts (Docket No. SJC-6708). This appeal is fully briefed and is awaiting oral arguments.

The probate court (Ginsberg, J) has ruled that it will treat Dr. Greco's complaint for modification as a de novo hearing on all issues of custody, including support payments. Ms. Greco never moved to amend her counterclaim to include support as an issue and Dr. Greco has objected to its inclusion by the court. Mr. Zupcofska has sought extensive production of financial records from Dr. Greco and from his wife, Elizabeth Greco. Mr. Zupcofska seeks to depose Elizabeth Greco over financial matters. Mr. Zupcofska has filed a contempt complaint against Dr. Greco because of an alleged failure to comply with discovery requests. Dr. Greco moved the probate court to stay proceedings on his complaint for modification pending the decision of the Supreme Judicial Court for Massachusetts.(Appendix, p. 10) The probate

court denied that motion (Ginsberg, J) and Dr. Greco moved the Supreme Judicial Court for Massachusetts to stay proceedings in the probate court. That motion was referred to a single justice and denied (O'Connor, J).(Appendix, p. 16)

STATEMENT OF FACTS

On September 1, 1989 Ms. Greco, the former wife of Dr. Greco, filed for divorce, appeared with her attorney ex parte before Judge Mary C. Fitzpatrick and requested restraining orders against Dr. Greco. The hearing was electronically recorded. Judge Fitzpatrick issued the ex parte restraining orders against Dr. Greco, which ordered him to vacate his home and gave sole custody of the Grecos' child to Ms. Greco. Ms. Greco delivered the orders to the Boston Police Department and Dr. Greco was subject to arrest for their violation. There are three aspects of this event that carry forward into the instant case.

The first is that Massachusetts law requires a hearing to be scheduled within

five days of issuing such ex parte orders. M.G.L. ch. 208, sec. 34B. The probate court did not schedule any hearing on the restraining orders. Massachusetts law further requires that such ex parte orders be written on a form which has a blank for the date of the hearing. Forms CJ-D 421 and 212. Judge Fitzpatrick did not write the orders on the proper form, thereby avoiding the statutory requirement to schedule a hearing.

Another aspect of the September 1, 1989 hearing which relates to the instant case concerns the service of the restraining orders. Massachusetts law requires that "the register shall transmit two certified copies of each order forthwith to the appropriate law enforcement agency which shall serve one copy of each order upon the defendant." M.G.L. ch. 208, sec. 34C. Massachusetts law also requires that such orders be served in hand. M.G.L. ch. 208, sec. 34C. Dr. Greco was never served in the manner prescribed by statute.

The third aspect of the September 1,

1989 hearing to carry forward is that Massachusetts law requires that a cassette copy of a hearing be provided to any party upon request. Supplemental Rule 201 of the Probate and Family Court. Dr. Greco requested a cassette copy of this hearing but never received one. In July 1993 Dr. Greco filed a complaint invoking the general superintendence of the Supreme Judicial Court for the Commonwealth. Judge Fitzpatrick was First Justice for the Suffolk Division of the Probate and Family Court Department and was the person upon whom service was made. The relief requested was primarily a writ of mandamus ordering the Probate and Family Court to produce a copy of the tape. Dr. Greco attempted to hire several large Boston firms to help him obtain a copy of the tape but they all turned him away. He also contacted two public interest law groups to seek assistance but they also declined. Before the hearing on Dr. Greco's complaint, the Probate Court stated that the tape had been destroyed and could not be produced.

The Supreme Judicial Court for the Commonwealth wrote:

> We think it is important to say that we are troubled by the handling of this case by the trial court....(at 157) By failing to obey the court rule and order, the register's office may have needlessly created the appearance of a cover-up...(at 158) Greco v. Suffolk Division of the Probate and Family Court Department, 418 Mass. 153, 635 N.E. 2d 243 (Mass. 1994).

The Supreme Judicial Court then ordered that "[c]ourt employees must comply with all the rules and orders of our courts." Greco, op cit. at 158. There were tapes of three other hearings, copies of which Dr. Greco had requested. As before, the probate court refused to produce copies of the tapes. In January 1995 Dr. Greco moved the Supreme Judicial Court to enforce its order above and to compel the probate court to produce copies of the tapes. In February 1995 the Attorney General notified Dr. Greco that the tapes will be produced to him.

After Ms. Greco filed for divorce in 1989, the Grecos could not agree on the best custody arrangement for the child and a trial

was scheduled for January 15, 1991. The members of the probate court are the triers of fact. On January 10, 1991 Dr. Greco was mobilized for Operation Desert Shield with orders to be at his reserve center in Providence, RI by January 15 for processing. Dr. Greco immediately notified the probate court and was told to appear before the trial judge as soon as possible. Dr. Greco appeared on January 11 to move for a stay of proceedings. The Soldiers' and Sailors' Civil Relief Act states that a judge "shall" stay proceedings unless the court determines that the member of the armed services is not materially disadvantaged by reason of his military service. 50 USCS App. sec. 521. The trial judge denied Dr. Greco's motion to stay proceedings, contacted Dr. Greco's reserve center and had the processing date put back to January 17. When Dr. Greco objected that his being mobilized would put his plea for custody at a disadvantage, the trial judge, the trier of fact, responded that "we'll have to cross that bridge when we come to it."

The trial went forward on January 15 and 16. When the deadline set by President Bush for January 16 had passed, the air war over Iraq commenced and Operation Desert Shield became Operation Desert Storm. Dr. Greco was processed on January 17 at his reserve center and transported to the Naval Hospital Philadelphia on January 18. He transferred to Fleet Hospital 15 and, after further training at Fort Dix, served in Saudi Arabia under the command of the First Marine Division. Dr. Greco also served in Kuwait with the 8th Marine Regiment. While in Saudi Arabia, Dr. Greco received the Judgment of Divorce Nisi and, because he disagreed that the custody plan was in the best interests of the child, filed a Notice of Appeal.

When Dr. Greco returned home from Saudi Arabia, the Grecos were able to reach an agreement concerning the custody of the child. They drafted a stipulation and filed it with the probate court. After living according to their stipulation for three months, the Grecos signed an enlarged version

as a formal agreement to settle all the issues of the divorce. In September 1991 the Grecos jointly moved to amend the Judgment of Divorce Nisi to the terms of their agreement.(Appendix, p.1) In November 1991 the Grecos, both pro se, appeared before the trial judge to present their joint motion. The trial judge denied the motion and appointed Bingham, Dana and Gould as counsel for Ms. Greco; she did, however, issue a temporary order that the custody arrangement could continue according to the Grecos' agreement instead of her judgment.(Appendix, p. 3) Form CJ-D 303 is a preprinted form for the appointment of counsel by a probate judge. It requires the judge to find that the party is financially unable to procure counsel. Judge Harms did not use Form CJ-D 303 and made no finding of indigency on the part of Ms. Greco. Ms. Greco is not indigent, has never claimed indigency and has never requested court-appointed counsel. Her annual income in November 1991 was $28,000 and with the support payments being made by

Dr. Greco was in excess of $36,000. During this hearing Ms. Greco stated her desire to have the agreement become the divorce judgment even after the trial judge had offered her court-appointed counsel. The judge, the trier of fact, stated that "it's [her] job to level the playing field." This hearing was electronically recorded; the tape of this hearing was one that the probate court had refused to produce and which necessitated Dr. Greco's motion to the Supreme Judicial Court. As of this writing, Dr. Greco has not yet had the opportunity to listen to the tape produced by the probate court.

In January 1992 the Grecos filed a second joint motion to have their judgment of divorce amended to the terms of their agreement.

Mr. Zupcofska entered his appearance in February 1992 and moved to dismiss Dr. Greco's appeal, to vacate the temporary order, to rescind the agreement and to "re-enter" the judgment of divorce. Dr. Greco

moved that the court appoint him counsel prior to hearing these motions, which the probate court denied (Smoot, J). Ms. Greco's motions were heard on February 26, 1992; all were allowed. The custody arrangement for the child, which had been agreed to by the parents and which had been in place for ten months, was abruptly changed. If the parents have reached an agreement concerning the custody of a child, Massachusetts law requires that the judge make specific findings that the arrangement is not in the best interests of the child if he is to order a different custody plan. M.G.L. ch. 208, sec. 31. There was no evidence presented at this hearing and the judge made no findings. Dr. Greco has appealed. This hearing was electronically recorded and was also one of which the probate court refused to produce a copy. Again, as of this writing, Dr. Greco has not yet had the opportunity to listen to the cassette copy.

On May 2, 1994 Judge Fitzpatrick wrote to Judge Ginsberg to inform him that she was

assigning the Greco case to him; in her letter she invited Judge Ginsberg to call her concerning the matter. In September 1994 Dr. Greco filed a civil rights complaint against Judge Fitzpatrick and others in federal district court. The complaint was dismissed (Stearns, J) on jurisdictional grounds, not on the merits. Dr. Greco has appealed to the US Court of Appeals for the First Circuit (Docket No. 94-2248). The Attorney General of Massachusetts moved for summary affirmance of the district court's decision. The Appeals Court denied that motion and the case is awaiting oral arguments.

In July 1994 Dr. Greco filed a Complaint for Modification in which he seeks to have his daughter attend the public school in Lexington, MA. Mr. Zupcofska again appeared for Ms. Greco. In July 1994 Ms. Greco's annual income was $50,000 and with the support payments being made by Dr. Greco was in excess of $64,000. Dr. Greco moved that Judge Ginsberg either appoint him counsel or remove Mr. Zupcofska as counsel for Ms.

Greco, which motion Judge Ginsberg denied.(Appendix, p. 5) Dr. Greco has appealed this issue to the Supreme Judicial Court for Massachusetts (Docket No. 6708). In the event of an unfavorable decision, Dr. Greco intends to appeal to this Court.

Where his daughter should attend school was the sole issue in Dr. Greco's Complaint. The probate court on its own initiative made the issue a de novo hearing on all matters of custody, including child support. Dr. Greco has objected to this order and has acted to preserve his right to appeal. Neither party had made support an issue in this Complaint. Dr. Greco amended his Complaint to include whether or not it was in the child's best interests to continue in a situation that required her to be in psychotherapy. Ms. Greco counterclaimed on Dr. Greco's Complaint and demanded sole legal custody. The Judgment of Divorce set Dr. Greco's child support payments at $275 per week and he has made these payments. Ms. Greco has not moved to amend her counterclaim to include child

support as an issue. Mr. Zupcofska has acted under the issue of child support to demand the production of Dr. Greco's financial records. Dr. Greco has produced his records. Apparently not satisfied, Mr. Zupcofska has filed a Complaint for Contempt against Dr. Greco for "failing to provide a formal written response to plaintiff's [sic] Request for Production of Documents as of the date of this Complaint." The Complaint also alleges that Dr. Greco failed to return the child to Ms. Greco by 8:00 PM on Christmas day. Dr. Greco contests the allegations in the Contempt Complaint. Dr. Greco and Miss Elizabeth Macdonald were engaged in May 1994 and set their wedding date to be January 28, 1995. Dr. Greco informed Mr. Zupcofska of the wedding date on January 13, 1995 in the course of his deposition. Mr. Zupcofska filed the above-mentioned Contempt Complaint on January 17, 1995 and scheduled the hearing for February 1, 1995. This was four days after the wedding and during Dr. Greco's honeymoon.

Rule 30(a)(v), Mass. R. Dom. Rel. P., requires that leave of the court be obtained to depose any witness in a case where child custody is an issue. Without obtaining leave of the court, Mr. Zupcofska issued a deposition subpoena to depose Dr. Greco's fiancee on January 20, 1995. He sought production of her financial records going back to two years before the time when she and Dr. Greco had met. He sought documents relating to all gifts from family members. In the week before the wedding, Dr. Greco had to file a motion to quash the subpoena and for the court to sanction Mr. Zupcofska for violating Rule 30(a)(v).(Appendix, p. 10) In his motion, Dr. Greco recalled two other instances for the court to consider for sanctions.

> 7. Furthermore, this is not the first improper action taken by Mr. Zupcofska.
>
> 8. Between May 1992 and August 1992 Mr. Zupcofska retained possession of a negotiable certificate that belonged to Dr. Greco but had been mailed by mistake to Ms. Greco. [the certificate had a $20,000 face value]... Mr. Zupcofska illegally

> retained possession of this certificate to obstruct efforts by Dr. Greco to obtain and pay for counsel.
>
> 9. In January 1994 Mr. Zupcofska illegally struck from a Summons for a new contempt action the preprinted order to meet with a Family Services Officer before the hearing.... Mr. Zupcofska sought to avoid meeting with the Family Services because they have been critical of his abusive practices, in particular of his illegal retention of the negotiable certificate.(Appendix, pp. 12-13)

The hearing on this motion occurred on January 25, 1995. Dr. Greco reminded Judge Ginsberg of Canon 3(B)(3) of the Massachusetts's Code of Judicial Conduct. Canon 3(B)(3) states as follows: "If a judge shall become aware of unprofessional conduct by a judge or lawyer (a) he shall, in the instance of a judge, report his knowledge to the Chief Justices of this court and of the court of which the judge in question is a member, and (b) in the instance of a lawyer, he shall initiate appropriate investigative or disciplinary measures." Judge Ginsberg made no statements concerning the incidents quoted above. Judge Ginsberg did not

admonish Mr. Zupcofska in any way for violating Rule 30(a)(v). Judge Ginsberg did not require that Mr. Zupcofska seek leave to depose Dr. Greco's fiancee and to give Dr. Greco the opportunity to oppose. Judge Ginsberg simply announced that if a date for the deposition could not be agreed upon by March 1, 1995, that he would order a date.

Ms. Greco filed no written opposition to the motion to stay and Mr. Zupcofska made no argument against it during the hearing on January 25, 1995. Nonetheless, Judge Ginsberg denied the motion. The probate court continued the above-mentioned Contempt Complaint until March 1, 1995. Dr. Greco moved the Supreme Judicial Court for the Commonwealth to stay proceedings in the probate court pending the resolution of his appeal. That motion was referred to a single justice, who denied it (O'Connor, J).(Appendix, p. 16)

ARGUMENT

Professor Krause has stated that the major impetus behind the divorce reform

movement was the desire to restore integrity to the legal system.

> A situation in which law and social reality had come to differ so widely that, to serve the popular demand and need for divorce, the parties, lawyers and, indeed, the judges needed to conspire to violate the law in the majority of instances in which a divorce was granted, should not have lasted as long as it did. For many observers, this consideration almost transcended substantive arguments....[at 328]
>
> Since collusive consent divorces based on varying degrees of perjury had long been available quite freely, the substantive thrust of modern divorce reform thus went less to the availability of divorce than to the integrity of the legal process....[at 334] Krause, Harry D., Family Law, West Publishing Co., St. Paul, 1986.

Justice Burger has spoken publicly about the decline in ethics among lawyers and about the threat it poses for public confidence in the courts. Perhaps there is a variety of Gresham's law for legal practice. It would be a rare client who would suffer a barrage of abusive discovery and praise his attorney for not returning fire because it was unethical. The considerations of Professor Krause show that divorce courts have long

been a nidus of unethical practice. The divorce bar could not be quarantined and, despite the good intentions of divorce reform, its less ethical habits have spread to infest other areas of legal practice, contributing in part to the problems noted by Justice Burger. It is not reasonable to expect a lawyer to ignore as a matter of course the rules of domestic relations procedure in the morning and then adhere religiously to the rules of federal procedure in the afternoon. Now it is understandable that large institutions will take time to change. The Massachusetts's probate court, however, is hostile to reform and has acted to preserve its unwritten prerogative to violate laws, thereby denying due process according to its whim and prejudice. Therefore, the policy consideration underlying this petition is the integrity of the courts and legal practice, whether the unethical practices of the divorce courts will be stopped or allowed to taint the next generation of lawyers. To return to the

analogy of Gresham's law, which currency does this Court wish to circulate?

Ms. Greco never claimed indigency and never moved for court-appointed counsel. Without having made a finding of indigency, Judge Harms had no authority, either by statute or by common law, to appoint counsel for Ms. Greco. Her failure to use Form CJ-D 303, which would have required her to make a finding of indigency before appointing counsel, violates a standing order of the Supreme Judicial Court for Massachusetts. In re Lucey, 331 Mass. 292, 118 N.E. 2d 762 (1954). Furthermore, if she had simply denied the joint motion, then her judgment would have remained in effect. The proceedings in the probate court would be over. Why appoint counsel? It is clear that Judge Harms appointed Mr. Zupcofska to dismiss Dr. Greco's appeal from her judgment. This underscores that she acted outside her jurisdiction; it was for the appeals court to decide whether or not Rita Greco should be appointed an attorney to defend against an

appeal. The spectacle of trial courts appointing counsel for non-indigent parties to dismiss appeals from their judgments is disquieting to anyone who believes in the rule of law. Her order is a usurpation of authority for which mandamus is an appropriate remedy. The failure of two other probate court judges (Smoot and Ginsberg, JJ) to correct this situation indicates a recurrent problem among the Massachusetts's bench. To allow Ms. Greco to benefit from free, court-appointed counsel at one of Boston's largest firms while denying the same benefit to Dr. Greco reveals a disabling prejudice in favor of Ms. Greco. Because the judges in the probate court are the triers of fact, this disabling prejudice has deprived Dr. Greco of an impartial trier of fact and hence of his constitutional right to due process. Mandamus is also an appropriate remedy for correcting a recurrent error among trial court judges.

It can not be contested that Judge Fitzpatrick violated M.G.L. ch. 208, sec. 34B

when she failed to schedule a hearing within five days of ordering ex parte that Dr. Greco vacate his home. It is understandable that many temporary restraining orders must be issued on the basis of incomplete evidence and will prove to be unnecessary. However, there is no excuse for the failure of Judge Fitzpatrick to allow Dr. Greco to be heard in the time required by statute; Judge Fitzpatrick also usurped authority denied to her by statute to issue ex parte restraining orders without giving the other party a timely opportunity to be heard. Her avoidance of the proper forms implies that she intended to deprive Dr. Greco of due process. The failure of the probate court to provide Dr. Greco with a copy of the tape of that hearing followed by the illegal destruction of that tape suggests that Judge Fitzpatrick said something on record relating to her violation of M.G.L. 208, sec. 34B or 34C. Furthermore, having been a defendant in a complaint filed by Dr. Greco, Judge Fitzpatrick should have recused herself from

the decision as to which judge would be the trier of fact in the Greco case. She reserved that decision to herself and ostentatiously invited Judge Ginsberg, the trier of fact, to call her about the case. Regardless of how innocent that invitation might have been, it does not look good.

Judge Ginsberg has done nothing to dispel any suspicion concerning Judge Fitzpatrick's invitation to call. His failure to address and remedy the constitutional problems created by the appointment of Mr. Zupcofska as counsel demonstrates a pattern of error among probate court judges. His introduction of support as an issue in Dr. Greco's Complaint for Modification, an issue which neither party raised, destroys any confidence in his impartiality. He appears to be following his own agenda. Mr. Zupcofska took Judge Ginsberg's lead and pursued an abusive course of discovery. Mr. Zupcofska deliberately violated the rules of domestic relations procedure and sought to depose Dr. Greco's

fiancee without obtaining leave of the court. He sought to depose her on the eve of the wedding and demanded that she produce all records of gifts from family members. Mr. Zupcofska filed a contempt complaint and scheduled it to be heard during Dr. Greco's honeymoon. While these events were rescheduled, Mr. Zupcofska succeeded in harassing Dr. Greco in the week before his wedding. Judge Ginsberg said nothing to admonish Mr. Zupcofska for violating Rule 30(a)(v), Mass. R. Dom. Rel. P., and, in essence, simply waived the rule. Canon 3(B)(3) of the Massachusetts Code of Judicial Conduct requires that a judge take some corrective action if he becomes aware of unprofessional conduct on the part of an attorney. Perhaps Mr. Zupcofska did not commit the crime of the century; the corrective action could have been proportionate. By waiving the rule, however, Judge Ginsberg violated Canon 3(B)(3) and turned a blind eye to the abusive practices of Mr. Zupcofska. This violation further

undermines any confidence in his impartiality as a trier of fact. Given the connivance of Judge Ginsberg in the abusive practices of Mr. Zupcofska, his introduction of support as an issue in the proceedings appears to have been a strategic move. By harassing Dr. Greco with de minimis contempt complaints and by dragging Elizabeth Greco into the suit, Mr. Zupcofska and Judge Ginsberg are trying to force Dr. Greco to obtain counsel, thereby mooting his appeal to the Supreme Judicial Court for the Commonwealth and ultimately to this Court. If Dr. Greco proceeds without an attorney, Judge Ginsberg will write punitive contempt judgments and new support orders based on falsely attributed income that will financially hamstring Dr. Greco and undermine his ability to pursue his appeal. When Dr. Greco objects, he will painted as a "deadbeat dad." Thus Dr. Greco went to the probate court to seek help in determining where his daughter would attend school and now finds that he must expose his wife to hostile questioning, his financial records to

scrutiny, and face what is essentially a criminal contempt complaint. And at the end of this tortured process, the determinations of fact and law will be made by the person hand-picked by Judge Fitzpatrick.

Due process requires an impartial trier of fact for the proceeding more than the right to appeal from the determinations of a biased trier of fact. The Massachusetts courts have refused to stay proceedings in the probate court until Dr. Greco's complaint about the appointment of counsel is decided. Dr. Greco has no other avenue to secure an impartial trier of fact except to move this Court for a writ of mandamus. Mandamus is an extraordinary writ. However, it is extraordinary for the highest court in Massachusetts to have to order that "[c]ourt employees must comply with all the rules and orders of our courts." Greco v. Suffolk Division of the Probate and Family Court Department, 418 Mass. 153 at 158, 635 N.E. 2d 243 (Mass. 1994). It is more extraordinary still that the probate court defied this

order until such defiance was brought to the attention of the Supreme Judicial Court for Massachusetts. Given that Dr. Greco had a clear right to a cassette copy of the September 1, 1989 hearing, it is extraordinary that no law firm in Boston would help him obtain it. In this environment Dr. Greco has no hope of finding an attorney who will oppose Judge Ginsberg's and Judge Fitzpatrick's agenda. Most attorneys and court employees would prefer to see the legal system run according to the rules, for it is the strict adherence to the rules that inspires confidence that an adverse decision was arrived at fairly. To return again to the analogy of Gresham's law, mandamus is necessary to demonstrate which legal "currency" is to circulate in the Commonwealth of Massachusetts: the corruption and abuse that divorce reform was to have corrected or due process.

CONCLUSIONS

Should this Court agree that the appointment of counsel by Judge Harms

violated Dr. Greco's constitutional rights, then even a writ of advisory mandamus to that effect would be beneficial. It would cause the probate judges to re-evaluate their beliefs and to re-assess the Greco case. It would also correct the recurrent misconception among the members of the probate bench that such an appointment is appropriate and in need of no remedy. Given that the probate court has defied a direct order of the Supreme Judicial Court for Massachusetts, there is no reason to believe that it would heed advice from this Court. However, the order to comply with court rules was ultimately successful in getting the probate court to obey the law. A similar order from this Court dealing with due process and obeying the Soldiers' and Sailors' Civil Relief Act would provide a more direct mechanism by which litigants in the probate court can protect their constitutional rights. Furthermore, the proceedings in the probate court must be stayed pending the resolution of these issues

and the selection of an impartial trier of fact. The Respondents have the power to extract punitive fines from Dr. Greco, to imprison him, and to issue support orders based on attributed income. In order to preserve the essential issue for the jurisdiction of this Court, the violation of equal protection and due process, the trial court proceedings must be stayed.

WHEREFORE, Petitioner prays this Court for the following relief:

1. an order advising the Probate and Family Court that its procedures for appointing counsel, as illustrated by the order of Judge Harms, violate Article 14 of the Amendments to the US Constitution;

2. an order advising the Probate and Family Court that the failure of its members to recognize and to correct this violation of constitutional rights demonstrates a disabling prejudice;

3. an order directing the Probate and Family

Court to make its procedures for appointing counsel conform with Article 14 of the Amendments to the US Constitution;

4. an order to stay proceedings in the Greco case (89 D 1677), except those that might be necessary to enforce the Judgment of Divorce, until the Probate and Family Court has complied with the above orders to the satisfaction of this Court;

5. any other relief which this Court deems appropriate.

Respectfully submitted,

Frank A. Greco

Frank A. Greco, MD, PhD
Pro Se
250 Grove St.
Lexington, MA 02173
(617) 860-9897

Dated: February 28, 1995

APPENDIX

09/12/91 Motion to Amend Judgment 1

Denied 11/22/91 (Harms, J)

11/22/91 Temporary Orders (Harms, J) .. 3

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Denied 08/03/94 (Ginsberg, J)

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(O'Connor, J)

BEST AVAILABLE COPY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. PROBATE & FAMILY COURT
No. 89D-1677-D1

Rita Greco,
Plaintiff,

v.

Frank Greco,
Defendant.

Motion to Amend Judgment of Divorce

Now come Rita Greco and Frank Greco, parties in the above-captioned case, and together move that this Court amend the Judgment of Divorce Nisi written on January 16, 1991. As reasons therefor, the parties state as follows:

1. Parties were married on January 26, 1980. They have one child, a daughter Caitlin, age 5. Rita Greco filed for divorce on September 1, 1989 and the parties have lived apart since that date.

2. The parties were unable to resolve their differences concerning their separation which culminated in a trial on January 15, 1991. Both parties were pro se for that trial.

3. Since that time the parties have been able to resolve their differences and have formulated their separation agreement in the attached document.

Wherefore, both parties respectfully request that this Court amend the Judgment of Divorce Nisi to the terms of the attached Agreement for Separation, Custody, and Property Settlement.

Respectfully submitted,

s/ Rita M. Greco
Rita M. Greco
12 Short St.
Charlestown, MA, 02129
242-1778

s/ Frank A. Greco
Frank A. Greco
42 Eighth St. Apt. 1108
Charlestown, MA 02129-4215
241-2861
Dated: September 12, 1991

COMMONWEALTH OF MASSACHUSETTS

PROBATE AND FAMILY COURT DEPARTMENT

SUFFOLK, ss Docket No. 89 D 1677 D1

Rita GRECO

v.

Frank GRECO

TEMPORARY ORDERS

The so-called "joint" motion of the parties, each pro se, seeking to amend my Judgment of Divorce Nisi dated January 16, 1991, came on for hearing before me today. Because I find that Ms. Greco has in fact serious reservations about the proposed amendments, and signed it under duress on account of Mr. Greco's pending appeal, I decline to amend my Judgment and the "joint" request to do so is DENIED. However, I order on a temporary basis that the parties may act in accordance with their "Agreement" dated September 12, 1991 (excepting the "Preamble" thereto which shall be null and void) instead of in

accordance with the Judgment Nisi. Further, I herewith appoint counsel for Ms. Greco: Attorney Peter Zupcofska of Bingham, Dana, and Gould in Boston (phone: 617-951-8000)

All until further order of the court.

11/22/91 s/ Christina L. Harms

date Christina L. Harms

Justice

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. PROBATE & FAMILY COURT

No. 89D-1677-D1&D2

Rita Greco,
Plaintiff, counter-defendant,

v.

Frank Greco,
Defendant, counter-plaintiff.

Motion re Counsel

Now comes Frank A. Greco, Defendant in the above-captioned case, and moves that this Court either appoint him counsel or remove Mr. Zupcofska as counsel for Ms. Greco.

As reasons therefor, Defendant states as follows:

1. Parties in this case, which commenced on September 1, 1989, were unable to resolve their differences and ultimately presented their positions at trial on January 15 and 16, 1991. Both parties were pro se at the trial.

2. On January 10, 1991 Dr. Greco was mobilized as part of Operation Desert Shield. Dr. Greco received the Judgment of Divorce Nisi while deployed in Saudi Arabia and filed an appeal. In May 1991, when Dr. Greco returned home, parties were able to resolve their differences; they filed a stipulation with the Court which outlined a tentative living arrangement and tried this arrangement for three months.

3. On September 12, 1991 parties signed an Agreement for Separation, Custody, and Property Settlement, which was essentially an extension of this earlier Stipulation. They filed a joint motion to amend the Judgment of Divorce to the terms of their Agreement.

4. The motion was heard in Essex County before the trial judge on November 22, 1991. The joint motion was denied and Mr. Peter Zupcofska was appointed as counsel for the Plaintiff because of the "duress" of Dr. Greco's appeal. However, the trial judge did order that the parties may live according to

their Agreement, as they had been for the preceding seven months. A copy of the order is attached.

5. Even after Court-appointed counsel had been offered to the Plaintiff on November 22, 1991, Plaintiff stated her desire to the Court to have the Agreement entered as the Judgment of Divorce.

6. On January 17, 1992 parties filed yet another joint motion to have their Agreement entered as the Judgment of Divorce.

7. On February 7, 1992 Mr. Zupcofska filed his Entry of Appearance.

8. On February 26, 1992 this Court vacated the temporary order allowing parties to live according to their agreement and re-entered the original Judgment of Divorce Nisi. Dr. Greco has appealed from that order. Although the custody arrangement of the child was changed by this order, there were no findings of fact made concerning the best interests of the child or why the custody arrangement

should be changed after ten months of stability.

9. Since the rescission of the parties' Agreement there has been constant litigation, which has affected the health and well-being of the child.

10. It was error to appoint counsel for Ms. Greco. "It is never 'duress' to assert intention to resort to courts for vindication of one's legal rights." US Title Co. of Arizona v. Gutkin. Ariz. App. 732 P. 2nd 579, 587. Therefore, the filing of an appeal by Dr. Greco can not constitute duress.

11. Neither party is indigent. The most recent financial statements show that Ms. Greco earns in excess of $40,000 per year. Although the parties are similarly situated, the Court has treated them irrationally with respect to the appointment of counsel. "The equal protection requirement precludes irrational treatment of people similarly situated" Sinn v. Board of Selectmen of

Acton, 357 Mass 606, at 611.

12. For the Court to appoint counsel for Ms. Greco but not Dr. Greco violates the Dr. Greco's right to equal protection, as guaranteed by Article 14 of the Amendments to the US Constitution. "If the State courts deny due process of law or equal protection of the laws to any one who seasonably raises the question, they are amenable to the corrective power of the Supreme Court of the United States" Duane v. Merchants Legal Stamp Co., 231 Mass 113, at 125.

WHEREFORE, Defendant respectfully requests that this Court either appoint him counsel or remove Mr. Zupcofska as counsel for Ms. Greco.

Respectfully submitted,

s/Frank A. Greco
Frank A. Greco
Pro Se
250 Grove St.
Lexington, MA 02173
Dated: July 14, 1994

denied by Judge Ginsberg in open court
August 3, 1994

numbered/ 255

stamped/ JAN 20 1995

initialed/ jd

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. PROBATE & FAMILY COURT

No. 89D-1677-D1&D2

Frank Greco,
Plaintiff, counter-defendant,

v.

Rita Greco,
Defendant, counter-plaintiff.

Motion to Quash Subpoena, Stay Proceedings, and Report Misconduct of Peter Zupcofska

Now comes Frank A. Greco, Plaintiff in the above-captioned case, and moves that this Court quash a deposition subpoena, stay proceedings in the current action, and report misconduct of Peter Zupcofksa to the Board of Bar Overseers.

As reasons therefor, Plaintiff states as follows:

1. In July 1994 Plaintiff commenced this action in order to have his daughter attend

the Estabrook School in Lexington. This Court changed the issue to a de novo hearing on custody.

2. Rule 30(a)(v), Mass. R. Dom. Rel. P., requires leave of the Court before any party may take a deposition in an action where the custody of a minor child is part of the relief sought.

3. On January 12, 1995, Peter Zupcofska caused to be issued a subpoena to depose Miss Elizabeth Macdonald on January 20. A copy of this subpoena and the schedule of documents to be produced are attached as Exhibit A.

4. Mr. Zupcofska has not obtained leave of the Court to conduct this deposition, in violation of Rule 30(a)(v).

5. These actions of Mr. Zupcofska are singularly abusive because Miss Macdonald and Dr. Greco are to be married on January 28, 1995 and Mr. Zupcofska clearly seeks to harass them on the eve of their wedding. He seeks production of documents relating to

gifts from family members and, given his history, will presumably demand sanctions if Miss Macdonald fails to produce copies of her thank-you notes and correspondence with the bridal registry. The deposition is calculated to spoil the celebration of a new family and its timing shows that Mr. Zupcofska lacks any residuum of the simple decency which would teach that there is a time to suspend litigation for a higher purpose.

6. The violation of Rule 30(a)(v) is clearly intentional. Mr. Zupcofska worked as an assistant register of probate in Norfolk County and can not plead ignorance of court procedures.

7. Furthermore, this is not the first improper action taken by Mr. Zupcofska.

8. Between May 1992 and August 1992 Mr. Zupcofska retained possession of a negotiable certificate that belonged to Dr. Greco but had been mailed by mistake to Ms. Greco. A

copy of this certificate is attached as Exhibit B. Mr. Zupcofska illegally retained possession of this certificate to obstruct efforts by Dr. Greco to obtain and pay for counsel.

9. In January 1994 Mr. Zupcofska illegally struck from a Summons for a new contempt action the preprinted order to meet with a Family Services Officer before the hearing. A copy of Mr. Zupcofska's Summons is attached as Exhibit C; a copy of a proper Summons is attached as Exhibit D. Mr. Zupcofska sought to avoid meeting with the Family Services because they have been critical of his abusive practices, in particular of his illegal retention of the negotiable certificate (Exhibit B).

10. Canon 3(B)(3) of the Code of Judicial Conduct states as follows: "If a judge shall become aware of unprofessional conduct by a judge or lawyer (a) he shall, in the instance of a judge, report his knowledge to the Chief Justices of this court and of the court of

which the judge in question is a member, and (b) in the instance of a lawyer, he shall initiate appropriate investigative or disciplinary measures." See also G.L. c. 211C, sec. 2(5)(e).

11. Mr. Zupcofska was appointed to represent Ms. Greco. The propriety of his appointment is currently before the Supreme Judicial Court for the Commonwealth (SJC No. 6708). The matter is fully briefed and oral arguments could be heard as early as the first week in March. The decision will bear on constitutional rights of Dr. Greco and it would best serve the interests of justice for proceedings in the instant case to be stayed pending the rescript of the Supreme Judicial Court. Ms. Greco will not be disadvantaged by a stay.

WHEREFORE, Plaintiff moves that this Court order as follows:

A. that the subpoena to depose Miss Macdonald be quashed;

B. that the actions of Peter Zupcofska be reported to the Board of Bar Overseers for disciplinary proceedings;

C. that all further proceedings in the instant case be stayed pending the decision of the Supreme Judicial Court.

Respectfully submitted,

s/Frank A. Greco

Frank A. Greco

Pro Se

250 Grove St.

Lexington, MA 02173

(617) 860-9897

Dated: January 18, 1995

stamped/ Middlesex,SS Jan 25, 1995

The Above Motion is Hereby Denied

s/Edward Ginsberg

Justice of Probate

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY
No. SJ-95-M0009

Frank A. Greco

vs.

Probate and Family Court
Department of the Trial Court

ORDER

This matter came before the Court, O'Connor, J., presiding, on an order of reference from the Full Court for disposition of the Motion to Stay Proceedings. Upon consideration thereof, it is ORDERED that the motion be, and the same hereby is, denied without hearing.

By the Court, (O'Connor, J.)

s/ George E. Slyva

Assistant Clerk

February 16, 1995